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Federal Communications Commission

DA 98-1799

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 96-204
Table of Allotments,)	RM-8876
FM Broadcast Stations.)	RM-9015
(Martin, Tiptonville and)	
Trenton, Tennessee) ¹)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 2, 1998;

Released: September 11, 1998

By the Chief, Allocations Branch:

1. At the request of Thunderbolt Broadcasting Company ("petitioner"), licensee of Station WCMT(FM), Channel 269A, Martin, Tennessee, the Commission has before it the Notice of Proposed Rule Making ("Notice"), 11 FCC Rcd 12695 (1996), proposing the substitution of Channel 267C3 for Channel 269A at Martin, Tennessee, and the modification of Station WCMT(FM)'s license accordingly (RM-8876). To accommodate the upgrade, petitioner also proposes the deletion of vacant Channel 267C3 at Tiptonville, Tennessee. A counterproposal was also filed by petitioner proposing the allotment of Channel 247A in lieu of Channel 267C3 at Tiptonville to accommodate the allotment of Channel 267C3 at Martin, the substitution of Channel 249C3 for Channel 248C3 at Trenton, Tennessee, and the modification of Station WWEZ(FM)'s license accordingly (RM-9015).² Petitioner filed comments in support of the proposal reaffirming its intention to apply for Channel 267C3, if allotted. In order to proceed, the Commission issued an Order to Show Cause, 13 FCC Rcd 5164 (1998), directed to Radiocorp of Jackson, Inc., seeking comments on why Station WWEZ(FM)'s license should not be modified to specify operation of Channel 249C3 in lieu of Channel 248C3. Comments were filed by Terry Hailey ("Hailey"), Twin States Broadcasting, Inc. ("Twin States"), and JoeMyers Productions, Inc. ("JoeMyers").³ Lyle Broadcasting Corporation ("Lyle") filed comments in

¹The community of Trenton, Tennessee, has been added to the caption.

²The counterproposal was placed on Public Notice on February 3, 1997, Report No. 2175 (RM-9015)

³JoeMyers filed a petition for rule making proposing the allotment of Channel 267A at Princeton, Kentucky, which conflicted with the proposed substitution of Channel 267C3 at Martin, Tennessee. The Princeton proposal, however, was timely filed to be considered as a counterproposal in the instant proceeding. On November 25, 1995,

response to the Order to Show Cause.⁴ Reply comments were filed by petitioner, Hailey, and Twin States.

2. Petitioner states that its counterproposal would result in a preferential arrangement of FM allotments under the Commission's policies because it would provide a first local aural service at Tiptonville (population 2,149),⁵ while providing the larger, faster growing community of Martin (population 9,246) with the ability to expand its existing service to a significantly greater population. Petitioner argues that the Commission "regularly" substitutes a lesser class channel for a higher class, provided an interest has been expressed in the lesser-class channel, citing Perry, Florida, et al., 11 FCC Rcd 4643 (1996). Petitioner further argues that the proposed upgrade can only be accomplished by deleting Channel 267C3 at Tiptonville and allotting it to Martin. It is well-settled, asserts petitioner, that the Commission strongly favors a licensee's maximization of its existing service to the public, particularly where it will serve a significantly larger population. Petitioner further asserts that substituting Channel 247A for vacant Channel 267C3 at Tiptonville would not cause any disruption to an "existing service" on which the public has come to rely, citing, Sanibel and San Carlos Park, Arizona 10 FCC Rcd 7215 (1995). Petitioner claims that the Class C3 upgrade at Martin would result in a 46% increase in population served and that nearly 30,000 listeners would gain at least primary service (60 dBu). Petitioner further claims that the allotment of the higher Class C3 facility to Martin rather than to Tiptonville would provide upgraded FM service to the more populous community of Martin. Petitioner states its intention to apply for Channel 267C3 at Martin and Channel 247A at Tiptonville, if allotted. Petitioner also states its willingness to reimburse Station WVEZ(FM) at Trenton, Tennessee, for its reasonable costs incurred in moving to Channel 249C3.

JoeMyers filed a request to withdraw its proposal, which we will grant in the context of this proceeding. In accordance with Section 1.420(j) of the Commission's Rules, JoeMyers certified that no consideration was received in exchange for its withdrawal of the expression of interest.

⁴Lyle advises that it is the licensee of Station WCIL-FM in Carbondale, Illinois, and is a counterproponent in a related proceeding, MM Docket No. 97-168, which also involves vacant Channel 267C3 at Tiptonville, Tennessee, together with the communities of Arcadia and Ellington, Missouri, and Carbondale and Steeleville, Illinois. Lyle states that its counterproposal proposed the substitution of Channel 268C1 for Channel 268B at Carbondale, Illinois, and the modification of Station WCIL-FM's license accordingly. To accommodate the upgrade, Lyle also requested that a site restriction of 9.6 kilometers southeast be imposed, if Channel 267C3 is retained at Tiptonville. Lyle further advises that neither Hailey nor Twin States interposes any objection to the site restriction proposed for Tiptonville. Moreover, Lyle states that petitioner's counterproposal to substitute Channel 247A for Channel 267C3 at Tiptonville would have no impact upon the proceeding in MM Docket 97-168. Therefore, Lyle renders no opinion on whether the Commission should delete Channel 267C3 or substitute Channel 247A at Tiptonville, other than to request that Channel 267C3 be site-restricted if retained.

⁵All population figures are taken from the U.S. Census

3. In response to the Notice, Hailey and Twin States filed comments and reply comments opposing the deletion of Channel 267C3 at Tiptonville, Tennessee, or alternatively, the substitution of Channel 247A for Channel 267C3 at Tiptonville, Tennessee. Both Hailey⁶ and Twin States express their interest in vacant Channel 267C3 at Tiptonville and state their intention to apply for the channel, if retained. Twin States argues that petitioner's proposal to substitute Channel 247A in lieu of Channel 267C3 at Tiptonville is not in the public interest since petitioner is the only party to express an interest in a Class A allotment. Twin States further alleges that petitioner's statement that it will effectuate the upgrade at Martin and construct and operate a Class A facility at Tiptonville is an "ingenious but unpersuasive ploy," since petitioner has "no real interest" in serving Tiptonville. Moreover, while Tiptonville is a community that deserves its own local service, Twin States asserts that the town and the surrounding area are too sparsely populated and too well-served by other regional stations to support a station whose own coverage would be restricted. Thus, argues Twin States, wide area coverage is a prerequisite for service by a new station in that community. Consequently, since a desire to construct a Class C3 facility has been expressed, and it has been determined that a Class A station cannot be reasonably be constructed in Tiptonville, Twin States argues that Channel 267C3 should be retained. Accordingly, Hailey and Twin States urge that petitioner's counterproposal requesting the substitution of Channel 247A for vacant Channel 267C3 at Tiptonville be denied since an interest has been expressed for the retention of the Class C3 allotment.

4. In its reply comments, petitioner reiterates its earlier arguments. Petitioner claims that Hailey's comments are deficient because of his failure to state his intention to promptly build a station, if authorized. Petitioner asserts that it is well-settled that expressions of interest that are not timely filed in contested proceedings are not acceptable, citing Santa Isabel, Puerto Rico and Christiansted, Virgin Islands, 3 FCC Rcd 2336, 2337 (1988); Franklin and White Castle, Louisiana, 11 FCC Rcd 8662 (1996); and Oakhurst, Firebaugh and June Lake, California, 9 FCC Rcd 655 n.3 (1994) (failure to state an interest in a channel can cause a dismissal of the proposal). Thus, because of this omission, petitioner argues that Hailey's comments should not be accepted.⁷

⁶In regard to the Tiptonville allotment Hailey notes that WENK of Union City, Inc. ("WENK") was awarded the construction permit to construct what became Station WAAT(FM) at Tiptonville. On September 15, 1994, WENK filed applications for an extension of time to construction and for a modification of its construction permit, seeking to move its site. Hailey states that on October 27, 1995, the Commission refused to grant the modification sought by WENK and refused to grant the extension of time to permit construction at the original site. A petition for reconsideration was filed by WENK, but by letter dated July 31, 1996, the Commission denied the petition for reconsideration, cancelled the permit and deleted the call sign. Hailey states on August 22, 1996, WENK notified the Commission that it would not seek further appeals of the Commission action.

⁷We note that Hailey's comments did express an interest in applying for Channel 267C3 at Tiptonville, and Hailey's reply comments stated his interest in applying for and constructing a Class C3 facility.

5. Discussion. As a threshold matter, we recognize that the petitioner styled its additional proposal to substitute Channel 247A for Channel 267C3 at Tiptonville and the related substitution of Channel 249C3 for Channel 248C3 at Trenton as a counterproposal. However, upon reexamination, this proposal is not a counterproposal because the proposed allotments at Tiptonville and Trenton do not conflict with the allotment proposed in the Notice in this proceeding. In this regard, it is well-established that "[a] counterproposal is a proposal for an alternative and mutually exclusive allotment or set of allotments in the context of the proceeding in which the proposal is made." See Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments, 5 FCC Rcd 931, 933 n.5 (1990). Rather than being a counterproposal, this proposal is an alternative allotment plan for resolving this proceeding, which for the reasons that follow, will not be granted.

6. Based on the information before us, we believe that the public interest would be served by retaining Channel 267C3 at Tiptonville, Tennessee, since there have been expressions of interest for the Class C3 allotment.⁸ As stated in the Notice, it is Commission policy not to delete a channel in which an interest has been expressed. See e.g., Calhoun City, Mississippi, 11 FCC Rcd 7660 (1996); Driscoll et al., Texas, 10 FCC Rcd 6528 (1995); and Woodville, Mississippi, et al., 9 FCC Rcd 2769 (1994). In this case, Hailey and Twin States have filed comments stating their intention to file applications for Channel 267C3 at Tiptonville, Tennessee. Under these circumstances, an allotment at Tiptonville must be retained. Since petitioner's original proposal requires deletion of the Tiptonville allotment, it will be denied. Likewise, although the petitioner's alternative proposal requested the substitution of Channel 247A in lieu of Channel 267C3 at Tiptonville, only petitioner has expressed an interest in a Class A allotment. Since the other interested parties have expressed their interest in a Class C3 allotment only, we find no overriding public interest benefit for downgrading the allotment to accommodate petitioner's proposed upgrade at Martin, Tennessee. While we recognize that the proposed Class C3 upgrade at Martin would provide new service to nearly 30,000 persons, the upgrade does not outweigh downgrading an allotment that will provide a first local service at Tiptonville, triggering FM allotment priority 3.⁹ See Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88, 92 (1982). Therefore, we are also compelled to deny petitioner's alternative proposal.

7. IT IS ORDERED, That the Secretary shall send a copy of this Report and Order Certified Mail, Return Receipt Requested, to the following:

⁸Although Lyle requested a site restriction for Channel 267C3 for Tiptonville, that issue will be addressed in MM Docket No. 97-168.

⁹The FM allotment priorities are: (1) First full-time aural service; (2) Second full-time aural service; (3) First local service; and (4) Other public interest matters. [Co-equal weight given to priorities (2) and (3).]

Thunderbolt Broadcasting Company
P.O. Box 318
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(Licensee of Station WCMT-FM)

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8. IT IS FURTHER ORDERED, That the petition for rule making (RM-8876) and the alternative proposal (RM-9015) filed by Thunderbolt Broadcasting Company, proposing the substitution of Channel 267C3 for Channel 269A at Martin, Tennessee, ARE DENIED.

9. IT IF FURTHER ORDERED, That at the request of JoeMyers Productions, Inc., the petition for rule making proposing the allotment of Channel 267A at Princeton, Kentucky, IS DISMISSED.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau